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IN THE

Supreme Court of the United States

October Term, 1954

No. 199

WILSON BROTHERS (an Illinois corporation),

Petitioner,

—v.—

TEXTILE WORKERS UNION OF AMERICA, C.I.O.; JOHN WM. HORTON, President, and MARTIN F. CLANCY, Treasurer, of LOCAL 675, TEXTILE WORKERS UNION OF AMERICA, C.I.O.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The plaintiff-appellant, Wilson Brothers, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit dismissing plaintiff-appellant's appeal from a judgment of the United States District Court for the Southern District of New York denying plaintiff-appellant's motion to stay an arbitration and granting the cross-motion of defendants-appellees to compel arbitration.

Opinions Below

The opinions of the Court of Appeals (App. 12-14) and of the District Court (printed in the record below filed herewith, A. 73a-78a) are not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1955. The order denying a petition for rehearing was entered on June 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statutes Involved

The pertinent statutes are set forth in the appendix, *infra,* page 11.

Questions Presented

1. Whether the judgment of the District Court granting defendants' motion to compel arbitration was reviewable by the Court of Appeals as a "final decision" (28 U. S. C. 1291) or was merely an interlocutory order as the Court below ruled.

2. If the judgment of the District Court was an interlocutory order whether it was appealable as an order granting or refusing an injunction (28 U. S. C. 1292) or was merely a non-reviewable stay in this action as the Court below ruled.

3. If the judgment of the District Court was reviewable by the Court below and if this Court decides to consider the questions of law presented on the merits to the Court below rather than remand the case to the Court below for a decision on those questions, such questions are as follows:

A. Whether the District Court had jurisdiction of the subject matter of this action for declaration of the rights of the parties in respect of vacation pay under their collective

bargaining agreement and for a determination whether arbitration should be stayed or compelled under the agreement. Jurisdiction was invoked under §301(a) of the Labor Management Relations Act (29 U. S. C. 185) and also the provisions in respect of declaratory judgments and diversity jurisdiction (28 U. S. C. 2201, 1332).

B. On the merits the issue is whether there is a bona fide arbitrable dispute in respect of claimed vacation pay under the terms of the collective bargaining agreement.

C. Whether the provisions of the Norris-LaGuardia Act (29 U. S. C. 108) prohibit the District Court from determining whether arbitration should be stayed.

Statement

The complaint, with annexed exhibits, and the affidavit in support of plaintiff's motion for a stay, and the affidavit in support of defendants' cross-motion to compel arbitration (contained in the record below filed herewith) disclose the following facts:

The complaint (A. 10a, references are to "Appendix to Appellant's Brief" which is the record in the Court below filed herewith) invokes the jurisdiction of the District Court by alleging that the arbitration sought by defendant is in violation of their collective bargaining agreement and brings the case within §301(a) of the Labor Management Relations Act (29 U. S. C. 185). The complaint also alleges facts supporting diversity jurisdiction (A. 3a-4a, 10a).

The collective bargaining agreement between the parties, dated March 4, 1952, expired according to its terms on March 15, 1954. The textile mill covered by the agreement, the Aetna Mill, Troy, New York, was closed and the employment of the employees represented by defendants was terminated on February 26, 1954 because the mill was

operating at a loss (A. 37a). Thereafter the defendant Union notified plaintiff employer that additional vacation pay was demanded under the terms of the collective bargaining agreement. The employer contends that under the two year agreement, from March 14, 1952 to March 15, 1954, two paid vacations were granted to all employees in July 1952 and July 1953, and that no additional pay is due under the terms of the agreement. The Union sought to submit the dispute to arbitration under the arbitration clause of the agreement but the employer brought this action to obtain a judicial construction of the contract that under its clear terms no third vacation pay is due and that therefore the arbitration sought should be stayed.

Section V of the agreement provides that disputes "arising out of or relating to this agreement or its interpretation or enforcement" shall be subject to procedures set forth therein for adjustment or arbitration (A. 15a). Section V-D provides "Arbitrators shall not have the power or authority to add to or disregard any of the terms or provisions of this collective bargaining agreement" (A. 17a). Section XVI-A provides for vacations with pay to employees who have been employed for fixed periods on May 31st of each year (A. 25a). Section XVI-B provides that vacation pay shall be based on earnings for the full four week period preceding the vacation (A. 25a). Section XVI-D provides that the customary time for closing the mill for inventory and vacation is the first two weeks in July (A. 26a).

The District Court took the view that the dispute is arbitrable under the terms of the contract (A. 74a-75a) and denied the employer's motion to stay the arbitration and granted the Union's motion to compel arbitration. On the employer's appeal the Court below, *sua sponte,* dismissed the appeal on the ground that the judgment appealed from was not a final decision and was not an appealable inter-

locutory injunction but merely a non-appealable stay order in this action (App. 12-14).

Reasons for Granting the Writ

1. *District Court judgment is appealable as a final decision (28 U. S. C. 1291).*—The Court of Appeals ruled that the District Court judgment compelling arbitration was not final but interlocutory relying on *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.*, 293 U. S. 449. But in the *Shanferoke* case the District Court order was merely a refusal of a stay of the contract action for damages pending arbitration. The Court of Appeals reversed and ordered that a stay be granted with leave to the District Court "to vacate it at any time should it appear that the defendant is in default in proceeding with the arbitration" (293 U. S. at 451). This order was obviously interlocutory and not final and this Court, *sua sponte,* raised the question of the order's appealability and ruled that it was appealable not as a final decision but as the denial of an interlocutory injunction. In this case, however, the District Court's judgment is distinguishable and is appealable as a final decision because it not only refuses a stay of arbitration but affirmatively compels arbitration on the basis of the District Court's opinion that the issue is arbitrable (A. 77a). The judgment here, by compelling arbitration, disposes of the only issue raised by the prayer of the complaint for a declaratory judgment that the collective bargaining agreement does not provide for arbitration of the claimed additional vacation pay. The judgment meets every legal and practical test of finality. If it cannot be reviewed on appeal, and petitioner is compelled to arbitrate the legal question of the construction of the agreement, the arbitrator's decision may be final and not judicially reviewable because of the statutory provisions restricting judicial review of arbi-

tration awards to questions of fraud or misconduct of the arbitrators (Federal Arbitration Act, 9 U. S. C. 10; New York Civil Practice Act, §1462), and also because of judicial decisions holding that an arbitrator's construction of a contract, even on a purely legal question, is final and binding and not reviewable by the courts. *Collingswood Hosiery Mills* v. *American Federation of Hosiery Workers,* 31 N. J. Supr. Ct. 466, 107 A. 2d 43 (very similar to the present case).

The collective bargaining agreement here involved was executed and was to be performed in New York. The New York Court of Appeals, interpreting its pioneer arbitration act (Civil Practice Act §§1448-1469) and the provision giving it jurisdiction to review final determinations (C. P. A. §588), holds that an order compelling arbitration is a final determination. *Hosiery Manufacturers' Corp.* v. *Goldston,* 238 N. Y. 22. On this procedural basis the Court of Appeals has established the doctrine that upon a motion to stay or compel arbitration the courts will determine as a judicial question whether a bona fide arbitrable issue exists and will dispose of the matter finally if no arbitrable issue exists. *Matter of Essenson (Upper Queens Medical Group),* 307 N. Y. 72; *Alpert* v. *Admiration Knitwear Co.,* 304 N. Y. 1; *General Elec. Co.* v. *United El. R. & M. Wkrs.,* 300 N. Y. 262; *Matter of International Ass'n of Machinists Dist. No. 15, Local No. 402* v. *Cutler-Hammer, Inc.,* 271 App. Div. 917, 67 N. Y. S. 2d 317, affirmed 297 N. Y. 519. In two judicial decisions, indistinguishable from the present case, it has been held that there is no arbitrable issue in respect of claimed vacation pay where vacations had been granted and the plants closed prior to the next vacation period and where because of the closing of the plant the employees had not fulfilled the contract requirement of employment at a certain time prior to the vacation period. *T. W. U.* v. *Firestone Plastics Division,* 6 N. J. Super.

235, 70 A. 2d 880, certif. denied 4 N. J. 515, 73 A. 2d 212; *Treloar* v. *Steggeman,* 333 Mich. 166, 52 N. W. 2d 647.

The decision of the Court below is diametrically opposed to the doctrine of the cited New York cases and cuts off a prompt and possibly the only available appellate judicial determination of the judicial question whether a bona fide arbitrable issue is presented under the terms of the contract. This expeditious appellate judicial remedy, which in practice has worked well in New York State courts to prevent unwarranted arbitrations, should not be denied to the federal courts unless the federal jurisdictional statute requires that result. It is submitted that the question whether the District Court judgment compelling arbitration is a final decision is an important question of federal procedure which should be decided by this Court and that the Court of Appeals has erroneously relied on the *Shanferoke* decision, *supra,* for the view that a judgment compelling arbitration is not a final decision.

2. *The District Court judgment is an interlocutory injunction (28 U. S. C. 1292(1)).*—Even if the District Court judgment is not appealable as a final decision, it is submitted that the Court below erroneously held that it was not appealable as an interlocutory injunction relying for support upon *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176. But the *Bodinger* case involved merely a refusal to stay an equity suit for an accounting pending a requested arbitration. In this case the judgment compelling arbitration, based on the District Court's opinion that an arbitrable issue is presented, is more than a mere stay and is in the nature of a mandatory injunction and therefore appealable even though interlocutory. The decision below is in conflict with *Hudson Lumber Co.* v. *U. S. Plywood Corp.,* 181 F. 2d 929 (C. A. 9) holding a stay of an action pending

arbitration appealable as an interlocutory injunction, and with *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33 (C. A. 4), holding that denial of a stay of arbitration is appealable as the denial of an interlocutory injunction. We believe that the decision below is also in conflict with the decision of the same Court in *Markel Electric Prod.* v. *United Electrical, R. & M. Wkrs.*, 202 F. 2d 435, holding that denial of a stay of an action for damages under a collective bargaining agreement pending arbitration was appealable as the equivalent of a denial of an injunction. The petitioner submits that this conflict of decisions on whether orders of district courts staying or refusing to stay actions pending arbitration should be resolved by this Court.

It is believed that the "law-equity" test of appealability of an interlocutory order (discussed in *Bodinger, supra*) is not applicable here because a judgment compelling arbitration goes far beyond a mere stay controlling the sequence of the trial of issues in an equity suit. But even if that test be applicable, it is satisfied here. We believe that this action for a declaration of the rights of the parties under a collective bargaining agreement is not an equity suit, or is not an action "clearly of an equitable nature" as the Court below states. An action for a declaratory judgment is *sui generis*. *U. S. Fidelity & Guaranty Co.* v. *Koch*, 102 F. 2d 288 (C. A. 3). Adherence to the historical distinction between law and equity for purposes of determining whether an order is a non-appealable "stay" in an equity suit, or an appealable "injunction" against a law action, has created procedural difficulty in determining federal appellate jurisdiction. But whatever the difficulty may be in other situations, it is submitted that since this is not an equity or admiralty suit the District Court's judgment granting the defendants' motion both to stay this action and also to

compel arbitration constitutes an appealable interlocutory injunction reviewable by the Court below.

3. *Other questions presented.*—If this Court reviews and reverses the decision of the Court below and does not remand the case to the Court below for a decision on the merits, the questions for decision are as follows:

A. *The District Court's jurisdiction of the subject matter.*—The complaint invoked the jurisdiction of the District Court under §301(a) of the Labor Management Relations Act (29 U. S. C. 185) in respect of "suits for violation of contracts between an employer and a labor organization * * *" and alleged that the threatened arbitration was in violation of the agreement (A. 10a-11a). The District Court held in its opinion that §301(a) conferred jurisdiction to compel arbitration (A. 76a). The defendant union in the Court below also agreed that §301 granted jurisdiction to compel arbitration. Cf. *Association* v. *Westinghouse Elec. Corp.*, 99 L. Ed. 368.

B. *There is no arbitrable issue.—The petitioner contends* that New York law should be applied and that under the decisions cited *supra*, page 6, a judicial determination should be made that there is no issue to be arbitrated in respect of vacation pay. The agreement provides for vacation pay for employees employed for fixed periods of time on May 31st of each year (A. 25a). Under the two year agreement two vacations were paid but since the plant was closed in February, and prior to May 31st of 1954, no further vacation pay is due as a matter of law and there is no issue to be arbitrated. The District Court held, and the defendant union contends, that the interpretation of the agreement in this respect is an arbitrable issue (A. 74a-75a).

C. *Stay of arbitration.*—The defendant union contended in the Court below that the Norris-LaGuardia Anti-Injunction Act (29 U. S. C. 101, *et seq.*) prohibited the District Court from granting a stay of the arbitration even though the Court had jurisdiction to stay this action and compel arbitration. The petitioner contends that a stay of arbitration to enforce a judicial decision that there is no arbitrable issue is not an injunction in a labor dispute in violation of the Norris-LaGuardia Act. *T. W. U.* v. *American Thread Co.*, 113 F. Supp. 143 (D. Mass., Wyzanski, *J.*); cf. *Alcoa S. S. Co.* v. *McMahon*, 173 F. 2d 567 (C. A. 2); *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 56 N. E. 2d 1; *Dinny & Robbins* v. *Davis*, 290 N. Y. 101.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Section 301(a) of the Labor Management Relations Act (29 U. S. C. 185) provides in part:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 8 of the Federal Anti-Injunction Act (29 U. S. C. 108) provides:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Title 28, United States Code, provides in part:

> § 1291. *Final decisions of district courts*
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, • • •

> § 1292. *Interlocutory decisions*
>
> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States • • • or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court • • •

Opinion of Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 291—October Term, 1954.

(Argued May 2, 1955 Decided June 2, 1955.)

Before:

CLARK, *Chief Judge*,
MEDINA, *Circuit Judge*, and DIMOCK, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*.

The plaintiff, Wilson Brothers, appeals from an order granting defendants' motion to stay this lawsuit and to compel arbitration of plaintiff's liability for vacation pay to its workers. Appeal dismissed for lack of appealable order.

EDWARD J. ENNIS, New York City (Clifford Forster on the brief), *for plaintiff-appellant*.

BENJAMIN WYLE, New York City (Max Zimny and William H. Englander on the brief), *for defendants-appellees*.

CLARK, *Chief Judge*:

This case concerns the duty to arbitrate a dispute arising out of a collective bargaining contract lawfully terminated by the employer in accordance with its terms. The union and the employer had come to disagree about the employer's continued liability for accrued vacation pay under the terminated contract. The employer attempted to frustrate the

union's announced intention of submitting this question to arbitration by initiating this action for a declaratory judgment. Its complaint sought a judicial interpretation of its contractual obligations and temporary and permanent injunctions against defendants' resort to arbitration. The union countered by cross-motions to require arbitration and stay the lawsuit, which were granted by the district court, and the employer appeals.

Although the defendants have not filed a motion to dismiss the appeal, we must of our own accord investigate our jurisdiction to decide this case. The orders entered below are clearly interlocutory, see *Shanferoke Coal & Supply Corp. of Delaware* v. *Westchester Service Corp.*, 293 U. S. 449, so that they are appealable only if they are sufficiently analogous to injunctive orders to come within 28 U. S. C. §1292(1). We do not think that the orders entered here can so qualify.

In *Stathatos* v. *Arnold Bernstein S. S. Corp.*, 2 Cir., 202 F. 2d 525, we recently had occasion to discuss in detail the effect of orders like the ones before us here. We there held that the granting of a stay pending arbitration was merely a decision about the manner in which the trial of the case should proceed, and not an injunction. Courts in other circuits have come to similar conclusions, see, e.g., *United States* v. *Richardson*, 5 Cir., 204 F. 2d 552; *International Nickel Co.* v. *Martin J. Barry, Inc.*, 4 Cir., 204 F. 2d 583; *International Refugee Organization* v. *Republic S. S. Corp.*, 4 Cir., 189 F. 2d 858. Of the two decisions looking the other way, one, *Hudson Lumber Co.* v. *U. S. Plywood Corp.*, 9 Cir., 181 F. 2d 929, which is factually on all fours with this case, has been recently criticized by implication in *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, and the other, *Jewell* v. *Davies*, 6 Cir., 192 F. 2d 670, certiorari denied 343 U. S. 904, is only a dictum.

Whatever questions it may suggest in other cases, the decision in the *Bodinger* case directly supports the result which we are reaching. The Supreme Court there determined, albeit reluctantly, that it could not abandon the distinction between actions formerly originating at law and actions formerly in equity. See *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, and *Ettelson* v. *Metropolitan Ins. Co.*, 317 U. S. 188. Even orders denying arbitration were held to be appealable only when the action was commenced "at law"; when the suit was "in equity," the stay was but a procedural step in the same action. It is perhaps regrettable that the Court did not feel prepared to follow the lead, rather suggested in *City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U. S. 254, of recognizing the union of law and equity into the one civil action where the procedural character of these orders would be realistically viewed in terms of modern trials. As it is, some confusion must remain; and our decisions permitting appeals from *denial* of a stay of action pending arbitration can be upheld only where they are actions "at law," i.e., for damages. See *Wilko* v. *Swan*, 2 Cir., 201 F. 2d 439—reversed on the merits, 346 U. S. 427—as explained in the *Bodinger* case, 348 U. S. 176, 179 n. 5, and *Markel Electric Products* v. *United Electrical, Radio & Machine Workers of America*, 2 Cir., 202 F. 2d 435. But here the action is clearly of an equitable nature, and the stay is not an appealable order. The appeal must therefore be dismissed.

Appeal dismissed.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Wilson Brothers, the Plaintiff-Appellant in the United States Court of Appeals for the Second Circuit, has filed a Petition in this court praying that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

QUESTION PRESENTED

The issue in this case is a narrow one despite the Petitioner's assertions to the contrary. The sole question involved is as follows:

Whether, in an action brought under Section 301 of the Taft-Hartley Act, seeking a declaratory judgment as to the

meaning of certain contract language and a permanent injunction against Defendants' resort to arbitration, a District Court judgment denying Plaintiff's application for a stay of arbitration and granting Defendants' application to stay the action and require arbitration, should be regarded as an order from which an appeal may be taken to a court of appeals.

STATEMENT

The Respondent, Textile Workers Union of America, CIO (hereinafter referred to as the Union), is the statutory collective bargaining agent of the employees of the Petitioner, Wilson Brothers (hereinafter referred to as the Company), at its Troy, New York plant (A. 62a[1]). The Union has been in continuous written contractual relations with the Company and its predecessor since 1945. The most recent agreement was entered into on March 14, 1952, and expired at midnight, March 15, 1954 (A. 13a, 35a, 57a).

At the end of February, 1954, the Company closed its plant and discontinued operations (A. 62a). It neglected, however, to pay vacation pay due under the contract although three-quarters of the vacation year had elapsed when operations terminated. By virtue of Section XVI of the contract (A. 25a, 26a), employees who have at least six months of service and who have fulfilled the necessary work requirements are entitled to vacation pay.

On June 2, 1954 the Union requested payment of vacation pay to the employees who met the contract's service and work requirements (A. 39a). When the Company re-

[1] References are to pages of "Appendix to Appellant's Brief," which Petitioner has notified Respondents was filed in this court as part of the record in the court below.

fused payment, the Union submitted the dispute to arbitration in accordance with Section V of the contract (A. 42a, 43a, 15a-18a). Section V provides for the arbitration of any unresolved "difference, grievance, or dispute between the Company and the Union or any employee arising out of or relating to this agreement or its interpretation or enforcement, . . ." (A. 15a).

Thereafter the Company instituted this action in the District Court seeking a declaratory judgment of the terms of the contract and a permanent injunction restraining the Union from resorting to arbitration (A. 11a, 12a). During the pendency of the action the Company applied to the court for an order staying the arbitration (A. 53a). In response, the Union, by cross motion, applied for an order staying the action and compelling the Company to arbitrate (A. 59a). The court denied the Company's stay of arbitration and granted the Union's motion staying the action and compelling arbitration (A. 79a). It held that the dispute was arbitrable in accordance with the provisions of the contract (A. 73a-77a).

The Company appealed to the United States Court of Appeals for the Second Circuit. In reliance on this court's very recent decision in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U. S. 176, the Court of Appeals dismissed the appeal. It held that the denial of the Company's application for a stay of arbitration and the granting of the Union's application for a stay of the action and an order compelling arbitration constituted an interlocutory order in an equity action concerning the manner in which the trial of the case should proceed and was therefore non-appealable as either a final order or an injunctive order within 28 U. S. C. Section 1292 (1).

ARGUMENT

A. The Federal Question Is Foreclosed By Prior Decisions of This Court.

On January 10, 1955, this court decided the case of *Baltimore Contractors, Inc.*v. *Jacob H. Bodinger,* 348 U. S. 176. The decision in that case is completely dispositive of the question presented by the Petition. It resolved the conflict in the decisions of the federal courts of appeals which then existed and on which the Company now relies to urge this court to grant review.

The *Bodinger* case involved an action for an accounting brought in a state court and removed to the federal district court on the basis of diversity of citizenship. The petitioner moved for a stay of the action pending arbitration under the terms of a contract. The District Court refused the stay. The petitioner then appealed to the Court of Appeals, Second Circuit, and that court dismissed the appeal, citing *Morgantown* v. *Royal Insurance Co.,* 337 U. S. 254.

This court granted certiorari because of the conflict between the decision of the Second Circuit and the decision of the Ninth Circuit in *Hudson Lumber Co.* v. *United States Plywood Corp.,* 181 F. 2d 929. In so doing, this court noted in footnote No. 1 to the case (p. 178) that "The *Hudson Lumber Co.* case was a suit for a declaratory judgment as to the meaning of certain contract provisions with a prayer for incidental injunctive relief. Appeal was allowed by the Court of Appeals from the District Court order staying the trial pending resort to arbitration as required by the contract."

The question for decision was described by this court as follows (p. 180):

> "... The question here presented involves the interpretation of 28 U. S. C. Sec. 1292 (1) which makes an exception to the requirement of finality, permitting appeals from 'interlocutory orders ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.' Appealability here turns on whether the District Court's refusal to stay this trial for arbitration was the refusal of an 'injunction' under Sec. 1292."

After an exhaustive review of the history of Section 1292 and its own decisions, including *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 and *Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, as well as decisions of the lower federal courts, this court concluded, primarily in reliance on its *Morgantown* decision, that in an action in equity a stay of an action pending arbitration or the denial of such a stay was only a decision as to how to try the case, and therefore was not an interlocutory order in the nature of an injunction. The court reached this decision with full awareness of the importance that some interlocutory orders bear to the eventual outcome of the litigation. Quoting from the *Morgantown* case it said (p. 184):

> "'Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions.' 337 U. S., at 258."

Though the court noted that its decision may tend to preserve undesirable distinctions between actions at law and actions in equity, it nevertheless stated that the remedy lies with Congress (p. 184).

> "The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. The incongruity of taking jurisdiction from a stay in a law type and denying jurisdiction in an equity type proceeding springs from the persistence of outmoded procedural differentiations. Some simplification would follow from an assumption or denial of jurisdiction in both. The distinction has been applied for years, however, and we conclude that it is better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper."

The action sought to be reviewed seeks a declaratory judgment as to the terms of a contract and ancillary injunctive relief. It is indistinguishable from the *Hudson Lumber Co.* case in this respect. The order sought to be reviewed denied an interlocutory stay of arbitration and granted a stay of the action instead. It therefore combines the characteristics of the stay of the action in the *Bodinger* case with the characteristics of the stay in the *Hudson Lumber Co.* case. Out of these requests for relief emerged this court's decision in the *Bodinger* case. Manifestly, the accompanying direction to the Company herein to arbitrate is wholly without legal significance. It does nothing more than affirm and enforce the refusal to stay the arbitration and the grant of the stay of the action. It does not detract from the essence of the court's decision in *Bodinger* which was that a stay of an action in equity pending arbitration or a refusal to stay the action is only a decision as to how to try a case. As Judge L. Hand said in *Murray Oil Products Co., Inc.* v. *Mitsui & Co.*, 2 Cir., 146 F. 2d 381, 383,

"Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39 (c), . . ."

In its Petition, the Company states that the lower court's decision is in conflict with the *Hudson Lumber Co.* case, discussed *supra*. Clearly, as demonstrated above, the decision in *Bodinger* resolved this conflict.

The Company also states that the lower court's decision is in conflict with the decision of the Court of Appeals for the 4th Circuit in *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33 and with the decision of the court below in *Markel Electric Products* v. *United Electrical, Radio & Machine Workers of America*, 202 F. 2d 435. Both of these cases involved actions at law for damages for breach of contract and not actions in equity. They are therefore inapposite and present no conflict with the subject case.

There is no conflict between applicable decisions of lower courts which have not been resolved by intervening decisions of this court. There is therefore presented no federal question of substance.

B. The Decision of the District Court on the Merits Is Clearly Correct.

The District Court held that the dispute between the parties relating to vacation pay was subject to arbitration under the terms of the contract.

Section V of the agreement between the parties sets up grievance machinery to be followed by arbitration of "Any

difference, grievance, or dispute between the Company and the Union or any employee *arising out of or relating to this agreement or its interpretation or enforcement, . . .*" (Emphasis added, A. 15a). As the District Court noted, "A broader grant of arbitration jurisdiction is difficult to envisage" (A. 74a).

Moreover, to remove any doubts that arbitration covers *all* disputes and differences, the parties stated again in Section VIII, A: ". . . this agreement provides for the orderly and amicable adjustment of any and all disputes, differences and grievances, . . ." It is this promise of arbitrability which provides the consideration for the Union's no-strike pledge in Section VIII, B (A. 18a, 19a).

Nevertheless, the Company argues that the Union's claim for vacation pay does not create an arbitrable issue. Section XVI, A, of the agreement, it is urged, requires an employee to be employed on May 31st, in order to be entitled to vacation pay the following June. Section XVI, B, states that vacation pay shall be based on earnings during the full 4-week period preceding the vacation (A. 25a). The Company claims that because the agreement was terminated on March 15, 1954, neither of these conditions could be met.

The Union claims that under the Company's interpretation, vacation payments could be avoided every year, simply by closing the plant on May 30th, and May 31st each year, for then, in the Company's view, no employee would be employed on May 31st, and there would be no full 4-week period of employment preceding May 31st on which vacation payments could be based. This is obviously an absurd result, and one which the parties never intended.

The correct interpretation of the contract views Section XVI, A, as a length of service requirement whereby every employee is entitled to vacation pay, provided he meets the work requirements. The work requirements stated in Section XVI, C, require employees of less than one year's service to be "in regular attendance on a steady basis;" employees who have attained a length of service of one year or more "shall be required to have worked the greater part of each of at least 32 weeks during the year preceding May 31st" (A. 25a, 26a).

Since the employees worked through the February preceding May 31st, or nine months of the new vacation year, they exceeded the 32 week work requirement, and are entitled to vacation pay. In addition, the 32 week work requirement rebuts any assumed requirement of *active* employment on May 31st of each year, and reveals that date as a cutoff or milestone date from which vacation pay rights are calculated.

Moreover, under a proper construction of the contract, the employees were "in the employ of the employer" on May 31st. Under Section III, B (A. 15a), Section V, E (A. 17a), Section VI (A. 18a), and Section XXV (A. 34a), an employee's employment could be terminated only by a voluntary quit, or a discharge for cause, which means a discharge for disciplin .ry reasons. Neither of these events occurred: the plant closing placed the workers in the status of furloughed or permanently laid-off employees, fully entitled to all accrued rights.

Furthermore, vacation pay is accrued wages earned through the daily labors of the employees with only payment deferred. These employees, having satisfied the serv-

ice and work requirements of the contract by working nine-twelfths of the vacation year, could not be deprived of their earnings by the Company's decision to close its plant.

Even assuming, *arguendo,* that the employees have not fully performed their obligations under the contract, they are entitled to vacation pay under the well established contract doctrine of partial or substantial performance. Complete performance was excused when the Company closed its plant and thus prevented and frustrated further performance by the employees. 17 C. J. S. Section 468, pp. 969, 970; *Restatement of the Law of Contracts,* Section 295, p. 438; *Williston on Contracts,* V. 6, Section 1951, p. 5461.

For each of these propositions asserted by the Union abundant authority from the decisions of courts and arbitrators will be cited below. But apart from authority, it would immediately seem clear that the sum of the parties' assertions and counter-assertions equals a "difference, grievance, or dispute between the Company and the Union or any employee arising out of or relating to this agreement or its interpretation or enforcement" such as the parties have agreed would be submitted to arbitration.

In urging that there is no dispute to arbitrate, the Company cites *Textile Workers Union of America* v. *Firestone Plastics Division,* 6 N. J. Super. 235. The contract provision in that case expressly provided that employees laid off between March 1st and May 1st were entitled to pro-rata vacation pay, thus excluding from vacation pay employees laid off prior to March 1. The Union's claim was barred because the employees had been laid off prior to March 1. The instant contract contains no such limitation. In Section XVI, C, thereof, it grants vacation pay

to employees with service of one year or more who have worked the greater part of 32 weeks during the year preceding May 31st, thus precluding any requirement of employment on a specific date, so long as the service and work requirements are met. The contract construed in *Treloar* v. *Steggeman*, 333 Mich. 166, also cited by the Company, lacked any provision similar to the 32 week service requirement in the instant contract. Moreover, the case did not involve arbitrability but rather a direct construction by that court of a vacation pay provision in an action for vacation pay. The opinion is devoid of reasoning or analysis. The court appears unaware of the abundant authority to the contrary.

In any event, the two decisions cited by the Company stand practically alone against a large body of court and arbitration cases holding for vacation pay in circumstances almost identical to those presented herein. Many of the cases rely on contracts whose provisions are far more stringent than the contract provisions present in this case.

In re Public Ledger, 161 F. 2d 762; *In re Wil-Low Cafeterias, Inc.*, 111 F. 2d 429; *Textile Workers Union of America* v. *Paris Fabric Mills, Inc.*, 22 N. J. Super. 381; *Owens, et al.* v. *Press Publishing Co.*, 34 N. J. Super. 203; *Calvine Cotton Mills, Inc.* v. *Textile Workers Union of America*, 238 N. C. 719; *In re Port Publishing Co.*, 231 N. C. 395; *Livestock Feeds, Inc.* v. *Local Union No. 1634*, 73 So. 2d 128; *Brampton Woolen Co.* v. *Local Union No. 112, et seq.*, 95 N. H. 255; *In re Brooklyn Citizen*, 90 N. Y. S. 2d 99 (not officially reported); *Division of Labor Law Enforcement, et al.* v. *Ryan Aeronautical Co.*, 106 Cal. App. 2d 833; *American Security Life Ins. Co.* v. *Moore*, 72 So. 2d 132;

Globe Corporation, 23 LA[2] 298; *A. D. Juilliard & Co., Inc.,* 18 LA 896; *Texas Textile Mills,* 15 LA 776; *West Virginia Pulp and Paper Co.,* 15 LA 742; *Penberthy Injector Co.,* 15 LA 713; *Central Packing Co.,* 14 LA 403; *Acro Switch Co.,* 14 LA 256; *North Star Woolen Mill Co.,* 14 LA 185; *Premier Worsted Mill,* 13 LA 804; *L. Hyman Company, Inc.,* 13 LA 800; *Harnischfeger Corp.,* 13 LA 429; *Catoir Silk Co.,* 13 LA 368; *In re Book Publishers' Shipping Service,* 12 LA 1207; *In re Hein-Werner Corp.,* 12 LA 1158; *In re Wabash Corporation,* 12 LA 1037; *Mays Landing Water Power Co.,* 12 LA 860; *In re Monty Cleaners,* 9 LA 602; *In re American Blower Corp.,* 9 LA 599; *Tauton Wool Stock Co.,* 8 LA 733; *In re Ashaway Wool Mills, Inc.,* 8 LA 137; *In re McQuay-Norris Mfg. Co.,* 7 LA 671.

The Company relies on decisions of New York courts which hold that a dispute is not arbitrable if there is no basis on which reasonable men could disagree about the issue in dispute.

It is, at the least, very doubtful if the arbitration statute and decisions of the State of New York have any application to this action. The decisions of this court, and the lower federal courts, hold that arbitrability under the Federal Arbitration Act relates to procedure or remedy rather than substance. *Guaranty Trust Co. of N. Y.* v. *York,* 326 U. S. 99; *Marine Transit Corp.* v. *Dreyfus,* 284 U. S. 263, 277, 278; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 124; *Heckers* v. *Fowler,* 69 U. S. (2 Wall.) 123, 128, 129; *Bernhardt* v. *Polygraphic Co. of America, Inc.,* 218 F. 2d 948, cert. granted May 31, 1955, — U. S. —, 99 L. ed.

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[2] The legend "LA" refers to the Labor Arbitration Reports published by the Bureau of National Affairs.

(Advance) p. 757; *Murray Oil Co.* v. *Mitsui*, 146 F. 2d 381, 383; *Parry* v. *Bache*, 125 F. 2d 493, 495; *California Prune & Apricot Growers Ass'n* v. *Catz American Co.*, 60 F. 2d 788, 790; *Wilson & Co.* v. *Fremont, etc.*, 77 F. Supp. 364, 379; *Pioneer Trust & Savings Bank* v. *Screw Machine Products Co.*, 73 F. Supp. 578, 580. The holdings of the highest court in New York are in accord with this view. *Matter of Berkovitz* v. *Arbib and Houlberg, Inc.*, 230 N. Y. 261, 270; *Meachem* v. *Jamestown, Franklin & Clearfield Ry.*, 211 N. Y. 346, 352. See also: Sturges and Murphy, *"Arbitration Under the United States Arbitration Act,"* 17 Law & Contemp. Prob. 580, 594.

The application of the Federal Arbitration Act and the inapplicability of New York law is undisputed when, as here, the action is in the federal court pursuant to the assertion of a federal right rather than by reason of diversity of citizenship. 39 *Cornell Law Quart.*, 74, 86, 87. See also: *Ass'n of Westinghouse Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437. Moreover, the doctrine enunciated in the New York cases cited by the Company has been severely criticized by legal commentators.[3]

In any event, in view of the vast body of decisions holding that a dispute over vacation pay, in the circumstances here involved, is arbitrable, and also supporting the Union's position on the merits, it is hardly tenable to conclude that no reasonable person could disagree with the Company's contract interpretation. It seems frivolous to urge that the Union's claim does not present an arbitrable issue.

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[3] Mayer, *"Arbitration and the Judicial Sword of Damocles,"* Labor Law Journal, Nov., 1953, p. 723; Rosenfarb, *"The Courts and Arbitration,"* N. Y. Univ. Sixth Annual Conf. on Labor, p. 161.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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